United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 9956

REGIONAL AGRICULTURAL CREDIT CORPORATION OF SPOKANE, WASHINGTON, a corporation,

Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate of Simon T. Douglas, deceased,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the United States for the District of Montana, Great Falls Division.

HONORABLE CHARLES N. PRAY, *Judge.*

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REPLY REGARDING STATEMENT OF THE CASE

On page 4 plaintiff states "There are many inaccuracies in appellant's statement of facts throughout its brief but we shall only mention a few of them at this juncture." A grave accusation! Nevertheless, plaintiff does not mention any such inaccuracies.

On page 4 plaintiff refers to the inclusion in the record of certain pleadings and trial briefs and makes the statement that no comment thereon is found in appellant's brief. They are referred to on page 5 of appellant's brief where the statement is made in lines 4 and 5, "These questions were fully argued and briefed to the court (R. 36-72). The court sus-

tained the demurrer (R. 35)." They are relied on for the assertion that the District Court originally held that the Montana penalty statute was not applicable to this case. It is submitted that the briefs demonstrate that the only question submitted for the decision of the court was the question of the applicability of the Montana penalty statute, (R. 36-72) and that the sustaining of the demurrer (R. 35) necessarily involved a holding that the Montana penalty statute was inapplicable.

On page 5 in the paragraph numbered (2) it is stated that fraud, bad motive and wrongful intention on the part of the R. A. C. C. were all present in this case. Attention is called to the fact that no reference to the record is made at any place in appellee's brief to sustain this very serious charge.

Appellant's reply brief will discuss the subjects in the same order as in the opening brief and in appellee's brief.

I

REPLY ON INAPPLICABILITY OF SECTION 10140 TO A CHATTEL MORTGAGE WITH A POWER OF SALE.

On page 6 plaintiff asserts "The great weight of authority, and substantially all authority holds that a power of sale, where title has not been vested by an instrument or trust, does not survive death." Plaintiff then cites cases from Montana, United States Supreme Court, California, Georgia, New York, and North Carolina and Corpus Juris Secundum. On page 8 the assertion is made that the chattel mortgage did not pass legal title to the mortgagee and it is asserted that the power of sale in the case at bar was different from the power of sale in the Muth case for that reason. Plaintiff's argument seems to be that if there had been a trust deed, the power of sale would have been coupled with an interest, but it being a mortgage it is not a power coupled with an interest. These authorities merely hold that the term "a power coupled with an interest" means "interest in the subject matter over or concerning which the power is to be exercised;" and that the interest must be in the thing itself. Such is the holding of the leading case of *Hunt* v. *Rousmanier's* Admr. 8 Wheat.

174, 5 L. Ed. 589. None of the authorities say that the lien of a chattel mortgagee is not such an interest in the thing itself.

The Supreme Court of Montana discussed this very question in the case of *Muth* v. *Goddard,* 28 Mont. 237, 72 Pac. 621. On page 626, in discussing whether a power of sale could be executed after the death of the mortgagor, the court referred to the case of *Hunt* v. *Rousmanier's Admr.* and then to the case of *First National Bank* v. *Bell Silver & Copper Mining Co.*, 8 Mont. 32, 19 Pac. 403. The court made the following statement (page 626):

> It was said by our own court, in First National Bank v. Bell S. & C. M. Co., supra: *"But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land that it becomes a part of the security and irrevocable."* (Italics added.)

The *Bell* case dealt with a power of sale in a mortgage. On page 409 of 19 Pac. the court stated the following:

> * * While the exact boundary between mortgages with powers of sale and deeds of trust are not very clearly defined, we think the deed in question should be classed with the former.

The Supreme Court of Montana in the *Bell* case in stating that a power of sale in a mortgage would make it irrevocable was therefore discussing a power of sale in a mortgage and not in a deed of trust and the Supreme Court of Montana in the Muth case in its discussion of *Hunt* v. *Rousmanier's Admr.* and the *Bell* case understood that the *Bell* case dealt with a mortgage, not with a deed of trust. The Supreme Court of Montana in the *Bell* case pointed out that mortgages containing powers of sale and deeds of trust are substantially the same thing at law and equity. On page 409 the court said:

> * * Mr. Perry, in his work on Trusts, (vol. 2, p. 163, Sec. 602d,) says: "Mortgages containing powers of sale and deeds of trust to secure a debt due to a

> creditor are substantially the same thing at law and equity. *At law both kinds of deeds purport to convey the legal title to the grantee or creditor or trustee; but in equity the land, the title, and the deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt. The mortgagor in both cases has an estate in the land, called an 'equity of redemption.'* If he fails to pay the debt, his equity of redemption is barred upon due proceedings had; but if the debt is paid at any time before his equity is defeated by the steps appointed to be taken, it becomes absolute, and he is entitled to a reconveyance or a discharge of the mortgage, as the case may be. (Italics added.)

The Muth and Bell cases repudiate plaintiff's contention that there is a difference between trust deeds and mortgages in this particular. No logical reason is suggested why there should be a difference.

It being the law in Montana, as determined by its Supreme Court, that a power of sale in a mortgage is a power coupled with an interest so that it survives death, this court will follow the law as so announced under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817.

In this connection it is also to be noted that the District Court concluded that there was a power of sale but that it was suspended by the provisions of Section 10140 (R. 306). In its opinion the court expressly stated that it was of the opinion that the power of sale survived the death of the mortgagor. (R. 298.) Plaintiff has not assailed this conclusion of law, either by a cross appeal or by a specification of error.

II

REPLY ON INAPPLICABILITY OF SECTION 10140 IN ABSENCE OF EVIDENCE THAT THE SALE OF MORTGAGED ASSETS WAS FRAUDULENT OR PURSUANT TO WRONGFUL MOTIVE OR FOR THE PURPOSE OF WRONGFULLY DEPRIVING DECEDENT'S ESTATE OF ITS ASSETS.

Section 10140 is a penal statute.

On page 11 plaintiff makes the assertion that Section 10140 Revised Codes Montana 1935 is not a penal statute, citing the case of *Jahns* v. *Nolting*, 29 Cal. 507. Plaintiff further asserts that the construction of the California statute made in *Jahns* v. *Nolting* was adopted by Montana when it adopted the statute in question from California.

It is remarkable but true that *Jahns* v. *Nolting* does say that the California statute then in effect, substantially similar to Section 10140, was not a penal statute. In discussing the matter the court in *Jahns* v. *Nolting* went further and stated on page 513:

> * * Such is the case in respect to sections two hundred and fifty and two hundred and fifty-one of the Practice Act, which provide respectively, that in certain actions for waste, and actions for cutting down and injuring timber, etc., the plaintiffs shall be entitled to treble damages; but those statutes, like the one under consideration, are not penal, but are remedial.

The foregoing is directly contrary to the holding of the Supreme Court of Montana in the case of *McDonald* v. *Montana Wood Co.*, 14 Mont. 88, 35 Pac. 668 (1894). This case is discussed on page 24 of defendant's opening brief. It is 28 years later than the case of *Jahns* v. *Nolting* regarding the same statute granting treble damages for damage to timber. The Supreme Court of Montana on page 670 said:

> * * * *It is needless to observe that the law is highly penal in its character.* By way of punishment it subjects the wrongdoer in certain cases to an extraordinary liability for the property of another appropriated to his use. (Italics added.)

The McDonald case establishes the law in Montana and in this case.

No case other than *Jahns* v. *Nolting* has stated that a double liability statute like Section 10140 is not a penal statute. On the contrary, all other courts discussing the matter state

that it is a penal statute. Even the Supreme Court of Oklahoma, cases from which are so heavily relied upon by plaintiff, has so stated. *Nichols & Shepard Co.* v. *Dunnington,* 121 Okl. 213, 247 Pac. 353 (1926) on page 355, the court said:

> * * * *In order to recover the penalty prescribed by this statute,* the plaintiff must fasten one of the enumerated acts upon the defendant. (Italics added)

It is so stated in *Springer* v. *Jenkins,* 47 Ore. 502, 84 Pac. 479 (1906). On page 481 the court said:

> * * * *The statute is highly penal in its consequences and was evidently intended to punish those who might wrongfully or in bad faith interfere with, convert to their own use, or dispose of the property of a deceased person, by mulcting them in double damages;* and its language should, we think, be so construed. (Italics added.)

It is so stated in *Roys* v. *Roys,* 13 Vt. 543 (1841). On page 545 the court said:

> * * * *The statute, subjecting the party to pay double the value of the property, is highly penal in its consequences,* and should not be applied to a case where he acted in good faith, under color of legal right, supposing he had good title, though it might turn out otherwise. (Italics added.)

Accord:

Batchelder v. *Tenney,* 27 Vt. 578 (1855)
Delfelder v. *Poston,* 42 Wyo. 176, 293 Pac. 354 (1930)

It is so stated in the text book relied upon by plaintiff. *Bancrofts Probate Practice,* Vol. 2, on page 893 the author stated:

> * * * *It is well said that the statute is highly penal in its consequences, and intended only to punish those who might wrongfully or in bad faith interfere with, convert to their own use, or dispose of the property*

> *of a deceased person.* To subject a defendant to the penalty given by the statute, it should therefore appear that he was an intermeddler, and acted from wrong motives or in bad faith; otherwise, the executor or administrator should be satisfied with the ordinary remedies given him by law. (Italics added.)

Montana has not adopted from California any construction of Section 10140 contrary to defendant's position. Plaintiff asserts the contrary on pages 11, 12 and 19.

In the first place, *Jahns* v. *Nolting* does not hold that the penalty statute will be applied to an innocent alienation of assets. The allegations of the complaint in *Jahns* v. *Nolting* were within the California penalty statute. The plaintiff, however, failed to prove a case within the penalty statute, probably because he failed to show that the alienation occurred intermediate the death of the decedent and the appointment of a personal representative. See the last sentence in the second paragraph commencing on page 513. The trial court merely found against the plaintiff under the allegations pursuant to the penalty statute and failed to find whether there had been an ordinary common law conversion outside the statute. To this failure the plaintiff excepted. The Supreme Court held that entirely aside from the penal statute an administrator had an ordinary common law action for conversion and that the court should have found with respect to it. That is the only holding in the case. The language relied on by plaintiff is dictum enunciated in 1866. There is no California case applying the double penalty California statute in a case where there has been merely an innocent alienation.

On page 19 of his brief plaintiff makes the statement that the district court took judicial notice of the fact that the Montana Code containing the statute in question was adopted in 1895. This is not correct. It first appeared as Section 129 of the Probate Practice Act in Laws of Montana 1877 at page 270. It read as follows:

> "If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of

> a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate."

Section 10140, Revised Codes of Montana 1935, is precisely the same except that it eliminates the comma after the word "therewith."

Also on page 21 plaintiff states that Section 10140 was taken from California. No authority for the statement is cited. What is the evidence? The similar California statute is first to be found as Section 116 of Estates of Deceased Persons, page 392 of Laws of California 1850-53. The section as it there appeared reads:

> "If any person prior to the granting of letters testamentary or of administration shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he shall stand chargeable and be liable to the action of the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate."

Although the substance of the two sections is the same, there are ten differences in wording and punctuation. Why, if the Montana statute was copied from the California statute, should there be ten differences in punctuation and wording?

It is pointed out in the case of *Delfelder* v. *Poston, supra* that the statute in question in various forms existed in a great many States. What evidence is there that the Montana statute was copied from the California statute rather than the statute, let us say, of Vermont, where it was applied in an entirely different way? The Vermont statute was much older than the California statute, having been the Sixty-eighth Section of the Probate Act of 1821, to be found in Compiled Statutes, page 347.

Assuming, however, that it was adopted from the California statute, it is not within the rule relied upon.

An exception to the rule relied upon is that the construction placed upon the foreign statute by the foreign court will not be followed if such construction is regarded as unsound in principle and against the weight of authority. This has been decided frequently by the Supreme Court of Montana. See:

State v. *Callow,* 78 Mont. 308, 254 Pac. 187

The court on page 193 said:

> "* * However, the rule that the adoption of a statute from another state carries with it the construction placed upon it by the courts of such state prior to adoption will be followed in this state only when that construction appeals to us as based upon sound reasoning and consonant with the intention of the Legislature in enacting the statute."

State v. *Stewart,* 57 Mont. 144, 187 Pac. 641,

Deer Lodge County v. *United States Fidelity & Guaranty Co.,* 42 Mont. 315, 112 Pac. 1060,

Anaconda Div. No. 1 v. *Sparrow,* 29 Mont. 132, 74 Pac. 197.

The holding by the Supreme Court of Oregon in *Springer v. Jenkins,* supra, that the penal statute will not be applied in the absence of wrong motives or bad faith, has not been overruled or impaired by subsequent Oregon cases. On page 23 plaintiff seems to leave the impression that the authority of *Springer* v. *Jenkins* with regard to the construction of the penalty statute had been overruled or impaired by subsequent Oregon cases. This is not correct. The case of *Swank* v. *Elwert,* 55 Ore. 487, 105 Pac. 901, on page 907, did criticize *Springer* v. *Jenkins* for holding that the defendant must affirmatively plead the amount of the debt in order to avail himself of the indebtedness in mitigation of damages. A reading of *Gabel* v. *Armstrong,* 88 Ore. 84, 171 Pac. 190, will also disclose that this was the only criticism made of the case of *Springer* v. *Jenkins.* The holding by *Springer* v. *Jenkins* that the penalty statute will not be applied in the absence of bad faith or wrongful motive stands unimpaired in

Oregon. *Springer* v. *Jenkins* is cited as authority for that principle in *Bancrofts Probate Practice,* page 893, where the author states:

> * * To subject a defendant to the penalty given by the statute, it should therefore appear that he was an intermeddler, and acted from wrong motives or in bad faith; otherwise, the executor or administrator should be satisfied with the ordinary remedies given him by law.

On pages 24 to 27 plaintiff asserts that *Merrill* v. *Comstock, Batchelder* v. *Tenney, Roys* v. *Roys, Jackson* v. *Lamar,* and *McDonald* v. *Montana Wood Co.,* disappear as authorities or do not have the remotest bearing upon the case at bar. Space does not permit repetition of the description of these cases. It is submitted that a reading of the cases will disclose that they are potent authorities in the case at bar.

Oklahoma is the only jurisdiction where a statute substantially similar to the Montana penalty statute has been applied to alienation in the absence of fraudulent conduct on the part of the alienor. The doctrine in Oklahoma has, however, been seriously impaired.

The first case so holding is *Litz* v. *Exchange Bank of Alva,* 15 Okl. 564, 83 Pac. 790 (1905). This was a hard case and although no direct evidence of fraudulent conduct is recited by the appellate court, there is at least the suggestion of surreptitious conduct or collusion. Cattle mortgaged for $9.00 a head and stipulated to be worth $12.00 a head were sold at foreclosure sale at $4.30 per head.

The *Litz* case has been followed twice. *Aultman and Taylor Machinery Company* v. *Fuss,* 86 Okl. 168, 207 Pac. 308 (1922). *Sauls* v. *Whitman,* 171 Okl. 113, 42 Pac. (2d) 275 (1935). The authority of the *Litz* case has, however, been seriously impaired by a series of three cases. The first is *Shawnee National Bank* v. *Van Zant,* 84 Okl. 107, 202 Pac. 285 (1921). Van Zant died in 1913. Prior to the appointment of an administrator the bank sold alfalfa seed and used the proceeds to pay debts of the decedent. Thereafter the widow was

appointed administrator and sued the bank for double the value of the seed sold. There was no evidence that the bank had been depriving the estate of its assets or that it had acted otherwise than in good faith. It had, however, brought itself within the principle contended for by plaintiff in the case at bar, in that it had alienated personal property of a decedent intermediate the death and the appointment of a personal representative. The court refused to apply the statute. On page 289 the court said:

> * * Of course if there was fraud connected with the transaction, or the party obtained an advantage over the estate, he might not be permitted to rely upon the wrongful acts of the executor de son tort, to obtain such an advantage over the estate or other creditors.

The second case is *Nichols & Shepard Co.* v. *Dunnington, supra.* Here the decedent had mortgaged certain machinery to Nichols & Shepard Co. After death it took possession of the machinery, advertised it for sale under the mortgage, held the sale and bid the property in. Thereafter, acting as the owner, it again advertised the property for sale and again bid it in. The Lower Court following the Litz case directed judgment for double the value of the machinery and deducted the amount of the indebtedness. There was no evidence that defendant was attempting to deprive the estate of its assets. The Supreme Court refused to apply the Oklahoma statute and distinguished the *Litz* case upon the ground that there the sale was to a third person instead of the mortgagee. That this was a distinction, without substantial difference, is pointed out by the Supreme Court of Wyoming in the case of *Delfelder* v. *Poston, supra.* If the Oklahoma court had desired to apply the doctrine of the *Litz* case it could have reasoned that, prior to the foreclosure sale the property had been owned by the decedent and the heirs of the decedent and the result of the foreclosure sale was to pass title to a new owner and that it was immaterial whether such new owner was the mortgagee itself or a third person.

The third case is *In re Wagner's Estate,* 178 Okl. 384, 62 Pac. (2d) 1186 (Okl. 1936). A husband took money belong-

ing to the estate prior to the appointment of an administrator and paid the same out. On page 1191 the court said:

> Where, before the appointment of an administrator, money belonging to the estate of a decedent is used by her husband to pay just and reasonable expenses of the funeral of the decedent, such action does not constitute either embezzlement or alienation within the terms of section 1219, O. S. 1931. Nichols & Shepard Co. v. Dunnington, 118 Okl. 231, 247 Pac. 353.

It is submitted that the authority of the *Litz* case is seriously impaired by these three cases.

The principle of construction noscitur a sociis is applicable. Plaintiff attempts to dispose of the doctrine of **noscitur a sociis** by a quotation from 59 Corpus Juris 979 to the effect that the use of the disjunctive militates against the application of the maxim. The only cases cited in footnote 46 to support the text are from Porto Rico and are not available for reading. It is to be noted that the text merely states that the disjunctive "militates" against the application of the maxim. In other words, in some cases the conjunctive would tend to make a stronger case for the application of the doctrine than the disjunctive. No authority is cited to the effect that the doctrine is inapplicable in the presence of a disjunctive. It would, of course all depend on the context.

Max Worthington acted only as agent of his wife. On page 34 the statement is made that the wire to R. A. C. C. dated January 23, 1935, reading "Not interested in handling Simon Douglas property if no other recourse than to take over all obligations," was sent by Max Worthington and not Dorothy Worthington. This is unfair comment. Max Worthington testified that he conferred with the R. A. C. C. respecting the assumption of the indebtedness with the knowledge and authority of his wife (R. 185). He further testified that he dispatched the telegram in question, Exhibit 5, with the knowledge and authority of his wife (R. 185). Counsel for plaintiff stated that he did not question the authority of Max Worthington to act for Dorothy Worthington (R. 187). The telegram from R. A. C. C. Exhibit 4, (R. 178) was addressed to Dorothy

Worthington. The evidence and stipulation of counsel for plaintiff (R. 184 to 187) demonstrate that the wire dispatched by Max Worthington was for and on behalf of his wife, Dorothy Worthington.

III

REPLY AS TO THE LACK OF EVIDENCE TO SUPPORT THE COURT'S FINDING THAT THE VALUE OF THE PROPERTY SOLD WAS $17,000.00.

Plaintiff, in order to sustain the finding, is reduced to the extremity of attempting to base an argument upon Exhibit 9 (R. 243). Exhibit 9 is an application for a renewal loan executed by the decedent, Simon Douglas, on November 27, 1934, more than two months prior to the material date as to value of the property sold. The application represented the value of the mortgaged property to aggregate $21,235.00. (See second page of Exhibit 9, R. 244.) Plaintiff contends that this is evidence of market value of the property sold. They were, in fact, representations respecting loan value made in an application for a loan on a going concern. They had nothing to do with market value. (See the uncontradicted evidence of plaintiff's witness Hal Clement, (R. 122, 123). Market value results only from the action and reaction of both a buyer and a seller.

Even if the application had to do with market value, it was executed on November 27, 1934. (Ex. 9, R. 243.) Circumstances at the time of the sale had changed as to several of these items so that the values set forth in the application were greatly reduced. 88 bucks were included in the application and are set up at a value of $20.00 per head. (R. 244.) The bucks sold were 36 four year olds, 30 five year olds and 8 aged. (R. 208, 209.) These bucks were old, the breeding season was over, they had served their purpose until the next breeding season. Most of them would never be used again. 36 of them were sold with the 1080 band of sheep at $2.25 per head (R. 208) and 38 of them in the other band at $3.40 per head. (R. 209.) There was received for the bucks a total of $210.00. (R. 86.) They were set up in the application for $1760.00, a difference of $1550.00 and over 800 per cent. (R. 243.) The application

sets up 30 horses aggregating $1125.00. (R. 244.) Only 21 were sold for a total of $860.00. (R. 86, 159.) The machinery and equipment is set up in the application at $2500.00. It was old (R. 215) and when sold had to be transported. It sold for only $435.00. (R. 159.) Merely in bucks, horses, machinery and equipment there is a demonstrable difference between the values set up in the application and the market price on February 5, 1935 aggregating $3,880.00 It is to be observed that Mr. Douglas put in 1186 old ewes at $3.00 a head for an aggregate of $3,558.00. This was in the fall of 1934, when according to the evidence the Government was buying old ewes at $2.00 a head and it was the opinion of everybody who testified on the subject that that was in excess of the market value. (R. 213, 255, 268, 277, 280, 284.) This is a further difference of at least $1,186.00 in the valuation set up by Simon Douglas. The items above discussed aggregate $5,066.00. If deducted from the total of $21,235.00 set up in the application the balance is $16,169.00. The property sold for $15,002.10. There is a further difference in that the application set up 168 head of sheep more than were sold. This was no doubt due to normal winter losses. Of course, when a borrower in the position of Simon Douglas, whose loan was in bad condition, makes an application for a renewal of his loan he does not give himself any the worst of it in setting up the valuations.

Plaintiff is not content to limit his argument, based on Exhibit 9, to chattels which were mortgaged to and sold by defendant at the foreclosure sale. On page 37 he bases an argument upon representations made by decedent in his financial statement shown at R. 243. Thus, plaintiff argues that decedent's sheep alone were worth $20,110.00. The financial statement to this effect showed 4251 sheep. The sheep sold by defendant, according to the uncontradicted evidence, aggregated only 3427. (R. 155.) The value of the 4251 sheep was represented by the decedent to be $20,110.00, upwards of $4.70 per head, a figure palpably absurd so far as market value is concerned. Plaintiff also bases his argument upon $2650.00 worth of hay represented to be 265 tons, although defendant sold only an aggregate of 136 tons. Not content with basing his argument upon items which were in existence, plaintiff goes further and bases it upon the estimated 1935

wool clip and lamb crop, although neither was in existence at the time of the sale.

It is submitted that plaintiff's argument in this regard comes to nothing.

IV

REPLY AS TO THE DEDUCTION OF THE INDEBTEDNESS SECURED BY THE MORTGAGE PRIOR TO APPLYING THE DOUBLE PENALTY OF THE STATUTE.

To support its position in this regard defendant cited cases from Wisconsin, Wyoming and Oregon. Against the contention plaintiff cites only one case arising under this double penalty statute, to wit: *Aultman and Taylor Machinery Co.* v. *Fuss* on page 43. It is submitted that not only the weight of authority but also better reason and logic supports the rule contended for by defendant.

V

REPLY AS TO A WHOLLY OWNED GOVERNMENTAL INSTRUMENTALITY OF THE UNITED STATES NOT BEING SUBJECT TO THE MONTANA PENALTY STATUTE.

On page 44 plaintiff asserts that R. A. C. C., although a wholly owned instrumentality of the United States Government, is liable "exactly like any other private corporation." The assertion is completely repudiated by the reasoning of the Supreme Court of the United States in *Federal Land Bank* v. *Bismarck Lumber Co.*, et al., No. 76 in the October term, 1941, decided November 10, 1941, 62 S. Ct. 1. There the losing party argued that the Federal Land Bank was functioning as a private corporation. On page 5 the court said:

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional

> exercise of its delegated powers is governmental. Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 477, 59 S. Ct. 595, 596, 83 L. Ed. 927, 120 A. L. R. 1466. It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental.

Defendant's argument in regard to the applicability of the *Bismarck Lumber* case to the case at bar appears on pages 43 and 44 of the opening brief.

On page 47 plaintiff attempts to avoid the doctrine of *Missouri Pacific Railway Co.* v. *Ault,* 256 U. S. 554, 65 L. Ed. 1087, 41 S. Ct. 593, because General Order No. 50 of the Director General provided that the order should not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures.

General Order No. 50, was promulgated by the Director General of Railroads on October 28, 1918, and is set forth in Exhibit E. The Supreme Court of the United States in the Ault case, did not, at all, base its decision upon General Order No. 50 but based it solely upon the Federal control statute and merely commended the Director General because in the general order, by eliminating actions for fines, penalties and forfeitures, he followed the statute as construed by the Supreme Court of the United States. On page 564 the court said:

> * * In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order, "provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures."

General Order No. 50 was not relied upon by the court as authority for the construction of the statute but was merely made the object of commendation by the court because the Director General had construed the statute the same as did the Supreme Court in the *Ault* case.

Neither of the parties in the Ault case relied upon General Order No. 50 as controlling the rights of the parties. On page 556 the court described the contention of the Director General as follows:

> * * * *The Director General did not contest liability for wages actually due, but claimed that under the legislation of Congress he was not liable for the penalty and that the state statute as applied to him was void under the Federal Constitution.* The claims of both defendants having been denied by the highest court of the State, they brought the case here by writ of error. (Italics added.)

On page 563 the court made the following statement respecting the contention of Ault:

> The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute is *rested specifically upon the clause in Section* 10 *to the effect that the carriers "shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law," and the provision in Section* 15 *that the "lawful police regulations of the several States" shall continue unimpaired.* (Italics added.)

The *Ault* case was relied upon by the District Court for the Southern District of New York in the *Corrigan* case and in the *McCrea* case and by the Circuit Court of Appeals for the Second Circuit in the *McCrea* case as constituting authority that consent by Congress to suit does not constitute consent by Congress to the imposition of penalties. Neither the District Court nor the Circuit Court of Appeals considered the case as resting upon the General Order of the Director General of Railroads. Reflection would probably lead to the conclusion that Congress could not, if it desired, leave to the discretion of the Director General a determination of whether the Director General could be suable either for compensatory or penal actions. Such a delegation would probably be unconstitutional.

Panama Refining Co. v. *Ryan,* 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

On page 45 and thereafter plaintiff attempts to distinguish the doctrine of *Missouri Pacific Ry. Co.* v. *Ault* upon the ground that the Director General of Railroads was more intimately a part of the United States Government than is a corporate instrumentality such as R. A. C. C. Defendant's argument in this regard is to be found on pages 45 to 48 of the opening brief. It is submitted that the authorities there referred to demonstrate that R. A. C. C. is no less a part of the sovereign government of the United States than the Director General. Any judgment against this defendant based on the Montana Penalty Statute would have to be paid from the Treasury of the United States.

On pages 44 and 50 to 54 a great number of cases are cited by plaintiff on this question. Space is insufficient to discuss each of these cases. Suffice it to say that no one of them holds that a corporate instrumentality of the United States is subject to a State penalty statute. Moreover, there is no contention by plaintiff that any of those cases so hold.

It is respectfully submitted that the judgment of the District Court should be set aside and that judgment should be entered in favor of the appellant.

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APPENDIX E

GENERAL ORDER NO. 50

Washington, October 28, 1918.

WHEREAS by the Proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said Proclamations that "until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes * * * but any orders, general or special, hereafter made by said Director shall have paramount authority and be obeyed as such"; and

WHEREAS the Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control, or with any order of the President"; and

WHEREAS since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and

damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

Subject to the provisions of General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in respect of any such cause of action or proceeding.

W. G. McADOO,
Director General of Railroads